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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 245

JOHN W. DAVIS AND JOSEPH LEO VEDDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioners and two others were convicted on three counts of derailing, disabling and wrecking trains in violation of 18 U.S.C. 371 and 1992. The court of appeals reversed the convictions on Counts I and II on the ground that the trial court's comments during trial infringed upon petitioners' constitutional right to remain silent, and remanded for a new trial. The convictions on Count III were reversed on the ground that the indictment was not legally sufficient. 357 F. 2d 438. We submit that there is no occasion for review by this Court of the interlocutory decision remanding for a new trial.

225-217—66

Petitioners were arrested in St. Lucie County, Florida by federal officers on March 12, 1964. Since petitioners could not post the bail set by the commissioner, they were taken to the St. Lucie County Jail, in accordance with the usual practice in Florida of keeping federal prisoners in State institutions (R. 199).[1] Petitioners' attorney conferred with them the next day in the attorney-client conference room of the jail (R. 224–225). At a hearing on petitioners' motion to dismiss the indictment, it was revealed that the room was equipped in such a manner that any conversation taking place in it could be monitored and tape recorded (R. 209–210). The chief deputy sheriff testified that, to his knowledge, no conversation in the attorney-client room had ever been monitored (R. 210), and that no F.B.I. agent was at the jail on March 13, 1964 (R. 212). The sheriff testified that he knew of no recordings made of the conference in question, and that there had been no request made of him to monitor any of petitioners' conversations by the F.B.I. or any other federal officer (R. 198, 201, 202). He considered petitioners to be federal prisoners and did not interrogate them or deal with them in any way other than to keep them in custody (R. 198). The deputy in charge of the radio equipment at the jail testified that he knew of no recording made of the conference (R. 215). Petitioners, as the moving parties, had subpoenaed but did not call F.B.I. agent Harry Morgan, who was prepared to testify

[1] "R." refers to the record on appeal, which includes a transcript of the trial.

that there were no recordings of the conversations in question (R. 228–229). Petitioners requested the right to inspect the government's investigative file or in the alternative to have the court inspect the file (R. 227). The request was denied, as was the motion to dismiss (R. 230).

1. Petitioners' argument that the government should be precluded from retrying them because of the mere possibility that a conference between attorney and client was overheard is without merit. The evidence presented at the motion to dismiss revealed only that the county jail was equipped for sound. There was no testimony that any conversations of petitioners were overheard. On the contrary, the sheriff testified that he considered petitioners to be federal prisoners as to whom he would take no action (other than the necessary acts of custody) without instructions—and that he had never received any request from the government to listen in on petitioners. The government should not be precluded from trying petitioners simply because a county jail, used for convenience, is equipped for sound surveillance.

2. Petitioners' complaint that the hearing before the district court did not adequately explore the eavesdropping issue is premature. In remanding on other grounds, the court below did not reach or discuss this issue. On retrial, petitioners will again have an opportunity to establish their allegations of eavesdropping. At such a hearing they may call as witnesses the F.B.I. agent who investigated the case and other federal officers who might have relevant information—a step petitioners have so far declined to take. If

petitioners' allegations are rejected, and they are again convicted, they can seek relief from the court of appeals. If the court affirms their conviction, this issue will then be ripe for review here.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966.

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